No. 85-1454

Supreme Court, U.S.
FILED
FEB 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT J. WILL, et al.,

Petitioners,

vs.

COMPREHENSIVE ACCOUNTING CORPORATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANCIS J. McCONNELL
135 South LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131

Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether Comprehensive, franchisor, can force petitioners, franchisees, to purchase its unwanted data processing services as a condition of remaining franchisees, absent a showing it possessed monopoly power?

2. Whether petitioners were entitled to an unambiguous instruction under this Court's holding in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), that the jury could find the requisite combination under Section 1 from petitioners' and other franchisees' unwilling acquiescence in or compliance with the tying restraints based on the communicated danger of termination?

LIST OF PARTIES

Petitioners, Plaintiffs

ALAN B. MILLER
ALAN B. MILLER, CPA, P.A.
THOMAS FOX
THOMAS FOX, INC.
ROBERT G. KARLE
ROBERT G. KARLE, INC.
MARTIN LUTHER VAN WINKLE
COMPREHENSIVE BOOKKEEPING ACCOUNTING, INC.
RAYMOND SCHNEIDER
GEORGE SCHNEIDER
SCHNEIDER & ASSOCIATES, INC.
HARRY T. CAHILL
HARRY T. CAHILL, INC.
LARRY S. PARTRIDGE
LARRY S. PARTRIDGE, INC.
JAMES F. LOBASH
JAMES F. LOBASH, INC.
FRANK ZARZECKI
FRANK ZARZECKI, INC.
CURTIS O. LEEBELT
FINANCIAL CONTROL CORPORATION, INC.
WILLIAM A. RUDD
WILLIAM A. RUDD, INC.
ROBERT J. WILL
ROBERT J. WILL, INC.

Respondents, Defendants

COMPREHENSIVE ACCOUNTING CORPORATION
COMPREHENSIVE BUSINESS SERVICES, INC.
LEO G. LAUZEN
CHRISTOPHER J. LAUZEN

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
CITATION TO OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT:	
I.	5
II.	6
III.	8
CONCLUSION	9
APPENDIX A:	
Panel Opinion Of The United States Court Of Appeals For The Seventh Circuit, October 28, 1985	1a
Order Denying Petition For Rehearing Entered November 25, 1985	23a
APPENDIX B:	
Statutes Involved	24a

TABLE OF AUTHORITIES

Cases Cited PAGE

Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976) 6

Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984) 6

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551 (1984) 5, 6

Monsanto Company v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984) 9

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 3, 4, 8, 9

Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971) 6, 7, 8

Standard Oil Co. v. United States, 337 U.S. 293 (1949) 7

Will v. Comprehensive Accounting Corp., No. 84-2761 and 84-2762 (7th Cir., October 28, 1985) .. 4

Statutes Cited

15 U.S.C. §1 2

15 U.S.C. §15 2

28 U.S.C. §1254(1) (1976) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT J. WILL, et al.,

Petitioners,

vs.

COMPREHENSIVE ACCOUNTING CORPORATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on October 28, 1985.

CITATION TO OPINION BELOW

The panel opinion of the Court of Appeals is printed in Appendix A, *infra*, pp. 1a-22a.

JURISDICTION

The panel opinion was entered October 28, 1985. The petitioners' petition for rehearing was denied on November 25, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 4 of the Clayton Act, 15 U.S.C. §15.

The foregoing statutes are printed in Appendix B, *infra*, at p. 24a.

STATEMENT

Petitioners are former and current franchisees of the Comprehensive franchise system. Comprehensive franchises independent businessmen to provide bookkeeping, accounting and tax services to their business clients. Among other things, Comprehensive provided mainframe computer services for processing franchisees' client reports for which it charged a fee. The Comprehensive franchise agreements provided that the franchisees were to have their data processing done on Comprehensive's mainframe computer unless they could get it done elsewhere at a cheaper rate (with the same quality and turnaround time).

With the advent of minicomputers, Comprehensive franchisees could realize significant savings in processing fees and turnaround time by purchasing or leasing minicomputers and doing their own data processing. These minicomputers produced client reports of equal quality and offered enhancements not available on the Comprehensive mainframe.

In response to the "minicomputer threat" and the impact wholesale defection from Comprehensive's mainframe would have on revenues, Comprehensive implemented a series of policies and procedures which effectively abrogated the contract right to have data processing done elsewhere or on franchisees' own minicomputers and required all data processing to be done on Comprehensive's mainframe. Franchisees failing to comply were threatened with termination and, in the case of petitioners who had installed their own mini systems, were terminated.

While, as the court below points out, there are numerous other concerns providing bookkeeping and accounting services, the Comprehensive franchise system was considered by its franchisees to offer a unique package or combination of services, not the least of which was the ability to transfer or sell their practices within the system at a substantially higher multiple (2.4 x annual billings) than the practices could command in the open market.

Accordingly, virtually all of the 400 Comprehensive franchisees (including one of the petitioners) acquiesced in or unwillingly complied with the tying restraints and continued to have their data processing done on the Comprehensive mainframe at a higher cost rather than risk termination and the resulting loss in value of their practices.

Petitioners tendered an instruction, which the district court refused to give, which was modeled on this Court's holding in *Perma Life Mufflers, Inc. v. International*

Parts Corp., 392 U.S. 134 (1968), and which would have permitted the jury to find the requisite Section 1 combination from acquiescence in or unwilling compliance with the tying restraints because of the communicated danger of termination. Instead, the court instructed that this alone was not enough and that the jury, additionally, had to find an agreement or conscious commitment to a common scheme. The jury returned a verdict in favor of respondent Comprehensive on the antitrust tying claims.

On appeal, the court below initially held that while petitioners were entitled to a *Perma Life* combination instruction, the district court's instructions, read as a whole, gave it. The court then proceeded to hold, as an alternative ground for affirming, that petitioners had failed to establish an illegal tie, as a matter of law, because Comprehensive did not possess the requisite market or monopoly power in the tying franchise because there were in fact numerous other concerns providing bookkeeping and accounting services and there were no barriers to entry. Thus the court below held:

> There is no evidence about Comprehensive's market share. The whole Comprehensive system is a pygmy among the large, national firms. There are also thousands of smaller firms. Many businesses produce accounting services internally, and these in-house services also are part of the market because they are substitutes for what the plaintiffs do.
>
> * * *
>
> Plaintiffs did not show or try to show that Comprehensive has a cost advantage over rivals and potential rivals, that there is a barrier to entry into the business of franchising. They did not show or try to show that rivals could not produce a similar package for a similar cost; without such a showing, they must lose.

Will v. Comprehensive Accounting Corp., No. 84-2761 and 84-2762, slip op. at 11a, 12a (7th Cir., October 28, 1985).

REASONS FOR GRANTING THE WRIT

I.

The holding of the court below directly conflicts with this Court's opinion in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984). In *Jefferson Parish*, this Court held that to establish an illegal tie, the plaintiff had to show that the supplier of the tying product or service had the special ability to force purchase of the unwanted tied product or service. The Court observed that this forcing or leverage could either be established in terms of market power or in terms of uniqueness of the tying product, citing to the Court's opinion in *Fortner I*:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.
>
> * * *
>
> Accordingly, we have condemned tying arrangements when the seller has some special ability—usually called "market power"—to force a purchaser to do something that he would not do in a competitive market. [Citations omitted.] When "forcing" occurs, our cases have found the tying arrangement to be unlawful.
>
> * * *
>
> When the seller's share of the market is high, see *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611-613, 97 L. Ed. 1277, 73 S. Ct. 872

> (1953), or when the seller offers a unique product that competitors are not able to offer, see *Fortner I*, 394 U.S., at 504-506 and n. 2, 22 L. Ed. 2d 495, 89 S. Ct. 1252, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate.

Id. at 1558, 1559, 1560-61.

The holding of the court below that because there are no barriers to entry to the provision of computation services and that, therefore, Comprehensive lacked the requisite market power or ability to force purchase of its unwanted mainframe data processing, both subverts this Court's holding in *Jefferson Parish* and ignores the acknowledged uniqueness of the Comprehensive franchise. The admitted fact that a franchisee's practice was worth two or three times as much within the Comprehensive system gave Comprehensive tremendous leverage to force purchase of its unwanted data processing on pain of explusion.

The holding also directly conflicts with the opinion of the Court of Appeals for the Ninth Circuit in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3534 (1985), and the opinion of the Court of Appeals for the Fifth Circuit in *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976), where the courts held that an illegal tie could be established based on the uniqueness of the tying product without showing market power over price.

II.

The holding of the court below directly conflicts with the holding of the Court of Appeals for the Ninth Circuit in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), In *Siegel*, the Ninth Circuit held that Chicken

Delight could not force its franchisees to purchase unwanted equipment and supplies from it. The only permitted exception was where specifications for the tied item would be so detailed that they could not practicably be supplied. *Id.* at 51, *citing Standard Oil Co. v. United States*, 337 U.S. 293 (1949). The court specifically rejected the notion that Chicken Delight had to have market power. Thus the court observed:

> Chicken Delight points out that while it was an early pioneer in the fast food franchising field, the record establishes that there has recently been a dramatic expansion in this area, with the advent of numerous firms, including many chicken franchising systems, all competing vigorously with each other. Under the circumstances, it contends that the existence of the requisite market dominance remained a jury question.
>
> The District Court ruled, however, that Chicken Delight's unique registered trade-mark, in combination with its demonstrated power to impose a tie-in, established as a matter of law the existence of sufficient market power to bring the case within the Sherman Act.
>
> We agree. In *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502-503, 89 S. Ct. 1252, 1258, 22 L. Ed. 2d 495 (1969), it is stated:
>
> > "The standard of 'sufficient economic power' does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market."

Id. at 49-50. The court went on to hold that the uniqueness of the Chicken Delight trademark itself was sufficient to establish a barrier to entry and leverage over the tied product as a matter of law. *Id.* at 50.

In a franchising context, the holding of the court below means any fast food franchisor, such as McDonald's, Chicken Delight, Taco Bell, Pizza Hut and others, can force purchase by its franchisees of unwanted food, equipment and supplies with antitrust impunity because of the lack of barriers to entry. Such a result directly conflicts with the holding in *Chicken Delight* and effectively makes proof of tie-ins in a franchise situation impossible.

III.

The holding below directly conflicts with this Court's holding in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). The court below acknowledges petitioners were entitled to an instruction under this Court's holding in *Perma Life*. A comparison of this Court's holding and the district court's instruction shows that petitioners did not get such an instruction. This Court held in *Perma Life* that a franchisee "can clearly charge a combination between [the franchisor] and himself, as of the day he unwillingly complied with the restrictive franchise agreements, . . . or between [the franchisor] and other franchise dealers, whose acquiescence in [the] firmly enforced restraints was induced by 'the communicated danger of termination' . . ." *Id.* at 142. In contrast, the district court instructed:

> The plaintiffs in this case must present direct or circumstantial evidence that Comprehensive and its franchisees had a conscious commitment to a common scheme designed to achieve an unlawful purpose. . . .

> This concept of a conscious commitment or a meeting of the minds means more than a mere showing that any franchisee conformed or acquiesced in the use of Comprehensive's mainframe or its approved mini computer for its data processing. It means that the franchisee unwillingly agreed to use Comprehensive for its data processing, an agreement induced by a fear of termination.

The district court explained that he felt constrained to give the additional "conscious commitment to a common scheme" instruction based on this Court's footnote 9 in *Monsanto Company v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984); yet as the court below concedes, the district court was mistaken in this view.

CONCLUSION

For the foregoing reason, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANCIS J. McCONNELL
135 South LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131
Attorney for Petitioners

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 84-2761 and 84-2762

ROBERT J. WILL, et al.,

Plaintiffs-Appellants, Cross-Appellees,

v.

COMPREHENSIVE ACCOUNTING CORPORATION, et al.,

Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 4035—**Paul E. Plunkett,** *District Judge.*

ARGUED SEPTEMBER 23, 1985—DECIDED OCTOBER 28, 1985

Before CUMMINGS, *Chief Judge,* EASTERBROOK, *Circuit Judge,* and GRANT, *Senior District Judge.**

EASTERBROOK, *Circuit Judge.* Franchising spread from hamburgers to the preparation of tax returns and then to the provision of regular accounting services. The Comprehensive Accounting Corporation authorizes accountants to provide service in Comprehensive's name. The franchisees agree to live up to Comprehensive's standards and to supply reports to clients in Comprehensive's style and bearing its trademark. This appears to be useful to

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

clients—perhaps because of the standardized method of doing business, perhaps because of Comprehensive's policing of its franchisees. Comprehensive is profitable, and so are the franchisees. The business of a franchisee apparently may be sold for more than two times annual gross revenues, while businesses of accountants in solo practice usually fetch much less.

Comprehensive's services to its franchisees include data processing. The accountants send data from clients' businesses to Comprehensive, which returns reports generated by its large computer. The contract between Comprehensive and its franchisees permits the franchisees to have data processed elsewhere, provided "the Comprehensive E.D.P. [electronic data processing] is not competitive for like services of the same quality, with the same turnabout time." In recent years small computers have become less expensive, and independent firms have written programs for these small computers that enable them to generate accounting reports and otherwise manage clients' data. Comprehensive's franchisees became interested in these smaller computers, which potentially could cut their costs of computation below the prices offered by Comprehensive.

Comprehensive did not take this gracefully. It had a large computer in place; the cost of this was sunk, so payments from franchisees for computation were mostly profit. Comprehensive's revenues from data processing reached $3.5 million yearly; these revenues were the firm's principal source of profit. The franchisees' savings from buying their own small computers would translate into losses for Comprehensive. It therefore insisted that franchisees use only small computers that would produce reports that looked *exactly* like those Comprehensive produced itself. Comprehensive says that it insisted on duplication in order to protect the reputation of its service mark and maintains that it was entitled by contract to be finicky; the franchisees say that Comprehensive was just postponing the inevitable, in breach of contract.

Duplication was hard. The commercially available programs were not designed to ape Comprehensive's reports,

and the output of Comprehensive's printer also looked different from the output of the low-price printers some franchisees wanted to use. Comprehensive promised to find and approve a small computer system that would meet its quality standards. It settled on a system that would be restricted to franchisees with 200 or more clients; most had fewer. Even the approval of this system moved slowly, with several changes of configuration that led some franchisees to conclude that Comprehensive would never be satisfied. In 1982 it announced that it would approve a system with programs Comprehensive had designed itself; it apparently planned to charge enough for these to make up for lost revenues from its larger computer.

Several franchisees decided to strike out on their own. Comprehensive threatened them with termination when it found out about this, so some franchisees installed small computers without informing Comprehensive. Comprehensive terminated five franchises in August 1981, sued three of them for substantial sums, and tried to persuade their clients to migrate to other accountants. As other franchisees began to use different systems, Comprehensive terminated them too.

Ten of the terminated franchisees and two others brought this suit against Comprehensive, one of its subsidiaries, the chairman of its board, and its president. They maintained that Comprehensive broke its contract by insisting that they purchase computation from Comprehensive even though it was "not competitive for like services of the same quality, with the same turnabout time." Comprehensive replied that the small computers did not supply the "same quality" service, and that at all events each of the franchisees had violated other provisions of the contract. The franchisees also argued that Comprehensive had violated §1 of the Sherman Act, 15 U.S.C. §1, by "tying" data processing (the tied product) to the franchise (the tying product).

The district court conducted a jury trial. The jury returned a general verdict for the defendants on the antitrust theory. Six plaintiffs prevailed on the contract the-

ory and six lost. The largest award was $37,678 to plaintiff Cahill; plaintiffs Rudd and Miller received $1; the others came out in between. Everybody appeals. Comprehensive and the other defendants say that the damages were excessive (they do not challenge the finding of liability); the six franchisees who lost on their contract claims say the verdicts are irrational because there is no significant difference between the winning and losing plaintiffs. All 12 franchisees challenge several of the instructions to the jury on both antitrust and contract claims; they also dispute some of the district court's decisions to admit evidence.

I

Section 1 of the Sherman Act prohibits any "contract, combination . . ., or conspiracy, in restraint of trade . . . ." The plaintiffs therefore needed to prove some cooperative undertaking. Establishing the necessary combination in a tying case requires exceeding subtlety, because the substantive theory of tying law depends on coercion to take two products as a package. The joint sale of two products is a "tie" only if the seller exploits its control of the tying product "to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1558 (1984). See also *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 703-05 (7th Cir.), *cert. denied*, 105 S. Ct. 432 (1984). A tie within the meaning of antitrust depends on showing that the buyer did *not* want to take both products from the same vendor. "[T]here is nothing inherently anticompetitive about packaged sales. Only if [buyers] are forced to purchase [the tied] services as a result of the [seller's] market power would the arrangement have anticompetitive consequences." *Hyde*, *supra*, 104 S. Ct. at 1565. If the buyer wants both products together—as, for example, the buyer of an automobile wants both chassis and engine together, even though they could be sold separately—there is no forcing, and so there is no tie-in.

As a linguistic matter, proof that the buyer took both products in a package against his will negates the existence of a "contract, combination, or conspiracy." The plaintiffs' position here is complicated by their contract, which they insist establishes that they did not agree to buy their computing services from Comprehensive. Tying is not cooperation among competitors, the focus of §1, it is aggressive conduct akin to monopolization under §2 of the Sherman Act. Tying usually is challenged under §3 of the Clayton Act, 15 U.S.C. §14, which addresses the practice explicitly. Joint action becomes an issue only when the plaintiff tries to take advantage of *per se* rules under §1.

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), overruled in part on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984), provides plaintiffs with an escape hatch. The Court stated that a franchisee "can clearly charge a combination between [the franchisor] and himself, as of the day he unwillingly complied with the restrictive franchise agreements, . . . or between [the franchisor] and other franchise dealers, whose acquiescence in [the] firmly enforced restraints was induced by 'the communicated danger of termination' . . ." 392 U.S. at 142. Although the franchise contract in *Perma Life* established the tie-in of which the franchisees complained, the essential principle—that "unwilling compliance" satisfies the joint action requirement of §1—applies to our case too.

This portion of *Perma Life* survived both *Copperweld* and *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984). *Copperweld* rejected an alternative holding in *Perma Life* that an agreement among jointly owned corporations satisfied the combination requirement of §1, but it expressly refrained from disturbing the holding we quoted above (see 104 S. Ct. at 2739). *Monsanto* made it harder to show joint action concerning price within a system of distributing products that is concededly full of joint action; *Monsanto* helps to separate the legitimate and illegitimate components of a generally cooperative system of distribution and has nothing to say about the

meaning of the joint action requirement in a tying case. See *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 732 F.2d 779, 780 (10th Cir.), *cert. denied*, 105 S. Ct. 178 (1984).

We therefore must decide whether the district court's charge correctly stated the *Perma Life* rule. The court told the jury:

> A conspiracy or agreement . . . may be shown to have existed in either of two ways. First, as between Comprehensive and the individual plaintiffs themselves, if the individual plaintiffs unwillingly accepted and agreed with the alleged tying arrangement. Second, the conspiracy may also be shown to have existed between Comprehensive and franchise dealers other than the plaintiffs whose agreement to Comprehensive's alleged tying agreement was induced by a communicated danger of termination. . . .
>
> The plaintiffs in this case must present direct or circumstantial evidence that Comprehensive and its franchisees had a conscious commitment to a common scheme designed to achieve an unlawful purpose . . . .
>
> This concept of a conscious commitment or a meeting of the minds means more than a mere showing that any franchisee conformed or acquiesced in the use of Comprehensive's mainframe or its approved mini computer for its data processing. It means that the franchisee unwillingly agreed to use Comprehensive for its data processing, an agreement induced by a fear of termination.

The first paragraph of this instruction is lifted straight from *Perma Life*. The plaintiffs say that the second and third paragraphs required the jury to find that the franchisees not only knuckled under to Comprehensive but also wanted to produce anticompetitive effects. This additional requirement, they say, was erroneously smuggled into the instructions from *Monsanto*. Certainly the plaintiff in a tying case need not show that it wanted the anticompetitive scheme to succeed; the buyer in a tying case

is a victim, and few victims want to pay monopoly overcharges. But we do not read the instructions as plaintiffs do. The court had somehow to get the jury to distinguish between the voluntary purchase of two products together, which is not a tie at all, and submission to the seller's forcing, which is both the definition of a tie and (under *Perma Life*) the definition of the agreement. The last sentence makes the point in a way lay jurors can understand. Plaintiffs received the *Perma Life* instruction to which they were entitled.

II

The court told the jury that in order to find a violation of the antitrust laws, it had to find six elements: (1) that data processing and the franchise are separate products;[1] (2) that the products were tied; (3) that there was an agreement; (4) that Comprehensive had market power; (5) that the plaintiffs suffered direct injury; and (6) that the damages were reasonably ascertainable. The court also instructed the jury that Comprehensive was entitled to use a tie-in if that was the "least restrictive means" of upholding its standards under its trademark. See Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & Econ.

[1] No mean feat because "franchises" (the tying product here) are just names and methods of doing business, not "products" and some courts have held that as a matter of law there cannot be a tie-in between a name and a product, see *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982); *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); *Jack Walters*, *supra*, 737 F.2d at 704-05 (reserving the question). A tie involves products that may be sold in separate markets. But a method of doing business (the franchise) is not sold separately from the ingredients that go into the method of business. A franchiser and its franchisees are part of a business organization not altogether different from vertical integration. See G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Contracts*, 28 J.L. & Econ. 503 (1985). We need not consider the implications of this approach, however.

345 (1985) (discussing the rationale of this defense). Plaintiffs challenge several of these instructions, most vigorously those concerning the justification of protecting the trademark.

These instructions may have a lot more to do with plaintiffs' defeat than the conspiracy instruction. After all, six plaintiffs prevailed on their contract claims, and several recovered damages based on the overcharge they paid for Comprehensive's service. The jury must have found that they were forced to (and did) use Comprehensive's computing services on pain of termination. Under the district court's instructions, they therefore also would have found a combination satisfying §1. The plaintiffs must have lost on their antitrust claims for some other reason.

We need not sift through the other instructions, however, because plaintiffs' case has a fatal weakness. They did not establish market power. They failed as a matter of law. This failure makes every other element of the antitrust case irrelevant.

The purpose of the rule against certain tying arrangements is to stop the extension of market power from one product to another. *Hyde*, *supra*, 104 S. Ct. at 1558-60 & n.20; *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Development Co.*, 758 F.2d 203 (7th Cir. 1985). The idea is that a firm with a monopoly of one product may refuse to deal except on terms that will lead to a monopoly of another. It also may be possible to use tying arrangements to extract a higher profit through price discrimination.[2] Both the extension

[2] There has been a debate among both judges and scholars concerning the effects of tying arrangements. The close division on the rationale in *Hyde* was attributable in part to this. On the scholarly debate, compare Phillip Areeda & Donald F. Turner, V *Antitrust Law* ¶¶1129c, 1134b (1980), Robert H. Bork, *The Antitrust Paradox* 140-44, 372-75 (1978), and Roger D. Blair & David L. Kaserman,

(Footnote continued on following page)

of power and the practice of price discrimination are impossible unless the seller has substantial market power. This means power over price, see *Hyde*, *supra*, 104 S. Ct. at 1566 n.46, the ability to induce buyers to pay more money by cutting back the supply of goods available for purchase. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10, 19-20, 22 n.40 (1979); *National Collegiate Athletic Ass'n v. Board of Regents*, 104 S. Ct. 2948, 2961-63, 2967-68 (1984). The best way to show power over price is to establish directly that the price of the tied package is higher than the price of components sold in competitive markets.

The early tying cases involved patented products, and the Supreme Court assumed that the patents conferred market power. Other cases have required the plaintiffs to prove the defendant's power, and the Supreme Court's two most recent tying decisions have gone for defendants in light of the plaintiffs' failures. In *Hyde* the Court assumed that the defendant had a market share of 30% of surgical procedures, which it exploited to force patients to take anesthesia from an unwanted provider; still, it concluded, this was not the sort of power that a plaintiff must show, and it cited earlier monopolization cases to suggest that the plaintiff must establish more than just a substantial share of all sales. *Hyde*, *supra*, 104 S. Ct. at 1566-68 & n.43. The Vertical Restraint Guidelines of the Department of Justice accurately reflect this authority in treating as lawful any tying arrangement affecting less than 30% of a relevant market. *Vertical Restraint Guidelines* §5.3 (1985).

---

[2] *continued*
Antitrust Economics 381-405 (1985), with Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985). See also S.J. Liebowitz, *Tie-in Sales and Price Discrimination*, 21 Economic Inquiry 387 (1983). Many scholars, and at least four Justices, would analyze tying arrangements under the Rule of Reason or permit them outright even when the seller has substantial maket power. We need not join the debate, given the conclusions discussed below.

United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) (*Fortner II*), considered "uniqueness," the other traditional way to establish market power in tying cases. U.S. Steel offered nonrecourse, low-interest, 100% credit to those who bought its prefabricated houses; you could not get the loan without taking the house. The Court treated this as unique. No one else offered a similar package. Yet it held that as a matter of law factual uniqueness was not enough; in order to establish market power by showing a unique package, the plaintiff must prove that "the seller has some advantage not shared by his competitors in the market for the tying product." 429 U.S. at 620. In other words, the plaintiff must show a barrier to entry that prevents competition.[3] If rivals may design and offer a similar package for a similar cost, there is no barrier, and without a barrier there is no market power. *Fortner II*, *supra*, 429 U.S. at 622: "Without any evidence that the [seller] had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the conclusion [of] market power". See *Spartan Grain & Mill Co. v. Ayers*, 735 F.2d

[3] The use of barriers to entry as a proxy for market power is familiar in the law of mergers. Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power. See e.g., *United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984) (market share exceeding 50% does not establish power over price when entry is easy); *Echlin Manufacturing Co.*, ___ F.T.C. ___ (June 28, 1985). Cf. William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 947-51, 962-68 (1981); Areeda & Turner, *supra*, at ¶504 (1978). True, even in the absence of barriers the inevitable delay in entry by rivals may enable those with a large share of a market to raise the price and make supracompetitive profits. But the possibility that short-run market power exceeds long-run power does not apply to a case, such as this, in which the restraints in question have lasted for many years. Rivals to Comprehensive have long since been able to enter, so that barriers (and not lags) are what matter.

1284 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 785 (1985), which overturned a jury verdict and held as a matter of law that "uniqueness" means the inability of a seller's rivals to offer a similar package, not simply the fact that no rival has chosen to do so. See also W. Kenneth Jones, *The Two Faces of* Fortner: *Comment on a Recent Antitrust Opinion*, 78 Colum. L. Rev. 39, 40-43 (1978); Kenneth W. Dam, Fortner Enterprises v. United States Steel: *"Neither a Borrower, Nor a Lender Be"*, 1969 Sup. Ct. Rev. 1, 23-28 (an analysis of "uniqueness" repeatedly cited with approval in both *Fortner II* and *Hyde*).

Plaintiffs did not claim, let alone offer evidence to show, that the price they paid for the franchise-computation package is higher than the price for those two products purchased in separate markets. The evidence—which shows that franchisees' businesses were worth more as a result of being members of the Comprehensive system—tends to show that the package Comprehensive furnished on the whole was beneficial, not priced at a monopoly level. They therefore failed to show market power directly. *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir.), *cert. denied*, 459 U.S. 857 (1982), holds that unless the plaintiff shows that the package price was elevated the suit must be dismissed without further ado. That is a sound position, for unless the package price exceeds the competitive price of its components, we have a replay of *Fortner II*. There U.S. Steel used "cheap financing in order to sell expensive houses" (429 U.S. at 622); here, for all the evidence shows, Comprehensive licensed its trademark cheaply in order to sell expensive computation.

To the extent plaintiffs may use market share or uniqueness as proxies for power over price, they failed on both counts. There is no evidence about Comprehensive's market share. The whole Comprehensive system is a pygmy among the large, national firms. There are also thousands of smaller firms. Many businesses produce accounting services internally, and these in-house services also are part of the market because they are substitutes for what the plaintiffs do.

Plaintiffs' principal argument was uniqueness. All they proved, however, is that Comprehensive's franchising system is unusual; there are few similar systems, and Comprehensive may be the most successful franchisor of accountants. *Spartan* holds that such a showing is inadequate. Plaintiffs did not show or try to show that Comprehensive has a cost advantage over rivals and potential rivals, that there is a barrier to entry into the business of franchising. They did not show or try to show that rivals could not produce a similar package for a similar cost; without such a showing, they must lose.[4]

The Supreme Court emphasized in *Hyde*, 104 S. Ct. at 1558-59, 1565, and again in *National Collegiate Athletic Ass'n*, *supra* 104 S. Ct. at 2962 n.26, that tyng may have competitive benefits. Sometimes the sale of the package is just a way to compete. Some accounting firms have offices throughout the nation and offer comprehensive services; a package franchising system may be a way to com-

---

[4] To the extent *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3534 (1985), holds that a plaintiff may prevail, without establishing power over price in the relevant market, by showing that rivals cannot produce *exactly* the same package, it conflicts with *Spartan*, *Kypta*, and several other cases, including *Jack Walters* in our circuit. E.g., *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030 (1st Cir. 1984) (no market power as a matter of law in a unique system); *Domed Stadium Hotel, Inc., v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Cir. 1984) (no market power as a matter of law in a factually unique reservation system that occupied more than 20% of its market). Sellers may strive to differentiate their products from others in order to compete for the custom of patrons with slightly different needs or tastes. It would be perverse to turn this ordinary attribute of the competitive struggle into a source of illegality. No one may copy Comprehensive's trademark or its copyrighted materials precisely, but rivals may create similar items for similar costs. Only when there is a barrier to entry—when rivals' cost of creating similar items is higher than the full costs of the original creator—may differences in the design of the package be treated as proof of market power. *Spartan*, *Kypta*, and the other cases we have cited are in line with *Fortner II* and *Hyde*; we follow them rather than *Data General*.

pete with the larger firms while retaining the advantages of independent ownership. Just about every conceivable method of organizing service is used in this business—national partnerships with blanket coverage, independent one-man offices, smaller partnerships, franchised systems, and in-house production. Each, including methods that revolve around tied packages, may be beneficial to some customers. In a competitive market the customers will pick the arrangements that work best for them. Antitrust law is based on the premise that when markets are competitive, the process of sellers' rivalry and buyers' choice produces the best results. Unless courts insist on a showing of market power, they run the risk of deleting one of the existing options and so reducing rather than enhancing the vigor of competition and the welfare of consumers.

Comprehensive had no market power. For that matter, it is not to be believed that Comprehensive wanted to monopolize (or posed a threat of monopolizing) computation services, the tied product. Competition in the computation business is exceptionally vigorous; plaintiffs' contract case depended on establishing that this vigorous competition made it cheaper to secure computation from vendors other than Comprehensive. Even if Comprehensive had some power, then, plaintiffs still must lose. "One of the threshold criteria the plaintiff must satisfy . . . is that there is a substantial danger that the tying seller will acquire market power in the tied product market." *Carl Sandburg Village Condominium Ass'n, supra*, 758 F.2d at 210. This case therefore did not need to go to the jury.

III

We have bypassed the challenges to the jury instructions on the antitrust issues because, in light of their failure to show market power, the plaintiffs had no case. The contract issues are altogether different. Six plaintiffs prevailed on the contract claims, and the defendants have not challenged the sufficiency of the evidence to support

these verdicts. We deal here with the defendants' argument that the damages are excessive. Then we take up in Part IV the losing plaintiffs' contentions.

The plaintiffs who recovered the largest verdicts are Cahill ($37,678) and Van Winkle ($15,000). They are the only two among the 12 plaintiffs who are still franchisees. Comprehensive maintains that the jury must have awarded damages to Cahill and Van Winkle for the difference between the price they paid to Comprehensive for computation and the cost they would have incurred had they been able to secure computation elsewhere. This award is impermissible, Comprehensive says, because its only breach of contract was the termination (or threatened termination) of those who took their computing business elsewhere. The provision of computation for a price was not itself a breach. (This argument applies to plaintiffs Partridge and Leebelt, too.)

Comprehensive also asserts that the verdict for Cahill must have included the costs Cahill incurred in defending an arbitration proceeding Comprehensive commenced to obtain a declaration that Cahill was in breach of contract for not using Comprehensive's computation. The arbitrator concluded that Cahill's small computer complied fully with the contract and ordered Comprehensive to retain Cahill as a franchisee in good standing. Under Illinois law, Comprehensive tells us, a party out of pocket the legal costs in one proceeding may not commence another to obtain reimbursement. *Ritter v. Ritter*, 381 Ill. 549, 46 N.E.2d 41 (1943).

The plaintiffs argue that the awards of damages for computing overcharges is appropriate because Comprehensive's tenacious defense of its computation revenues violated the clause in the contract allowing franchisees to go elsewhere. As for the costs of defending the arbitration, Cahill insists, Illinois permits recoveries to be based on the costs of litigation, when the very institution of the prior suit was a part of the defendant's wrongful conduct. *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 413 N.E.2d 47 (1980).

Cahill believes that the jury was entitled to find that Comprehensive instituted the arbitration as part of a campaign to make it too costly for the franchisees to stand on their rights. The plaintiffs introduced a memo written by the president of Comprehensive advising other managerial personnel that "if we do not take action of a punitive nature the rest of the [franchisees] will feel that it is okay to put in a mini-computer because there was no penalty in so doing." Although this memo did not discuss the Cahill arbitration, we have been invited to infer that Comprehensive was bent on punishing all franchisees who defected to small computers, no matter the contract.

If the district court had granted summary judgment or prevented the matters from going to the jury, we would have two very difficult issues of law. Was the sale of computation under threat of termination a breach in addition to the terminations themselves? Did Comprehensive act in wilful disregard of the contract in commencing the costly arbitration against Cahill? The difficulty is that the judge sent the case to the jury, and the instructions did not ask the jury to consider either question. It was simply told to find the plaintiffs' damages. Comprehensive objected to the introduction of the evidence of the costs of arbitration, but it did not propose an instruction to the jury describing what it would have to find in order to award these costs as elements of damages. Although part of its argument now may be construed as a claim that the jury could not award these costs even if the arbitration had been instituted in bad faith, it did not propose an instruction excluding these costs from consideration. Fed. R. Civ. P. 51 requires us to assume that the instructions given were correct; in a civil case each party must live with the legal theory reflected in instructions to which it does not object. *United States v. Atkinson*, 297 U.S. 157 (1936); *Tweed's Case*, 83 U.S. (16 Wall.) 504, 515-16 (1872).

We have general verdicts. When a party does not ask for an instruction limiting the kinds of damages the jury

may award (or informing the jury of the things it must find before it may award an item of damages), we may reverse the district court's denial of a judgment n.o.v. only if no reasonable juror could have found the evidence sufficient under the instructions it heard. If a party could argue that the evidence was insufficient under the correct legal standard, this would be an indirect method of attacking the instructions, which we have just held plaintiffs may not do. Once the law of this case is settled by failure to object to the instructions, the parties may argue only that the jury did not play its proper part. Because the jury's part is to apply the instructions to the facts, we may scrutinize its conclusions only to find out whether it did so. It did. Cahill incurred substantial expenses defending the arbitration, and the jury could have found these attributable to Comprehensive's effort to make an example of Cahill for the edification of the others. One of Comprehensive's managers told Cahill that the arbitration would serve as an example, and even after Comprehensive lost the arbitration it informed other franchisees it had won, that the arbitrator had required Cahill to conform to all of Comprehensive's demands. If Comprehensive was using Cahill as an example, and this was part of its breach of contract, the jury was entitled to compensate Cahill. Comprehensive must administer such lessons at its own costs. Similarly, under the instructions actually given, there was evidence from which the jury could have concluded that the excessive charges for computing—backed up by threats of termination that Comprehensive was not entitled to issue—were a breach of contract.

IV

We come now to the plaintiffs' efforts to upset the verdicts on the contract claims. There are four: two based on evidentiary rulings, one based on an instruction, and one based on inconsistency among the verdicts.

1. The plaintiffs presented to the jury all of Comprehensive's machinations to induce them and franchisees

in general to keep using Comprehensive's large computer. They also introduced evidence about the termination of and suits against three other franchisees in August 1981. The district court balked, however, when they tried to show how Comprehensive had reacted to 22 additional franchisees who installed small computers. The court thought this evidence cumulative and excluded it under Fed. R. Evid. 403. The court also kept out the brief Comprehensive filed in the Cahill arbitration, the arbitrator's "restatement" of the reasons for his award, and portions of the testimony of one witness to a particularly offensive retaliatory act by Comprehensive against a person not a party here (carting away the files of a franchisee who used a small computer). All of this was cumulative, some unduly prejudicial. The trial spans more than 3,000 pages of transcript, and there was apparently no end to the number of incidents plaintiffs could have produced to show that Comprehensive used every device it could imagine to quash the threat of small computers. The district court was entitled to call an end, once the jury got the general picture. The district judge knows better than we how much is too much; he did not abuse his discretion. See *United States v. Watson*, 623 F.2d 1198, 1203 (7th Cir. 1980).

2. The district court let in one bit of evidence that plaintiffs wanted kept out: the testimony of Thomas A. Mass, Comprehensive's outside counsel during the time Comprehensive was trying to round up its renegade franchisees. He had given advice to Comprehensive about the meaning of its contract and had served as a lawyer in the Cahill arbitration and several suits against terminated franchisees. The court allowed Mass to testify that he had advised Comprehensive that its acts (and the procedures limiting small computers to those that produced identical reports) were necessary to protect Comprehensive's trademarks and trade secrets. Plaintiffs say that Mass, having served as counsel in this litigation until he was listed as a witness, should have been precluded from testifying. But an attorney is a competent witness, see Fed. R. Evid.

601, 611; 3 *Weinstein's Evidence* 601-33 to -37. When an attorney withdraws from active representation before testifying, the jury is not likely to be confused about his role. The rules of ethics (see Disciplinary Rule 5-102) say that a lawyer should not be both witness and counsel in the same case (although there are exceptions for hardship, see DR 5-101(B)(4)). Mass withdrew as counsel well before he testified, and the district court did not abuse its discretion in permitting Mass to do this. Cf. *United States v. Morris*, 714 F.2d 669, 672 (7th Cir. 1983).

3. Comprehensive filed counterclaims against the plaintiffs, contending that they used its name and trademarks in an unauthorized way. See the Lanham Act, 15 U.S.C. §§1051-1127. Although the district court held that Comprehensive's claim for statutory damages was "equitable" and therefore would not be submitted to the jury, it told the jury that Comprehensive was entitled to terminate franchisees who palmed off their reports as Comprehensive's or wrongfully used its trade secrets. The plaintiffs concede that the instruction was accurate, but they say it was confusing because their use (or misuse) of the marks and secrets depended on the franchise agreement. If the termination was wrongful, they point out, they were entitled to go on using the marks and methods.

The instructions do not establish a vicious circle. Another instruction told the jury that "[i]n order to deal with these claims you must determine first if there was a breach of contract and, second, which party was responsible for breaching or breaking the contract first." The instructions read together told the jury that if the franchisees breached by palming off their reports as Comprehensive's (or in some other way), they could be let go; if Comprehensive breached first, they could continue to act as franchisees. Although the franchisees say they were put in a no-win position by Comprehensive's demand to make all reports "identical" to those produced by its computer—compliance with which exposed them to a claim of "palming off" when Comprehensive refused, as they say, to provide trademarked paper on which to print the reports—the resolu-

tion of disputes of this sort is exactly the function of juries.

4. Six franchisees won and six lost. The losers say that there is no rational foundation for the difference. Six franchisees used identical small computer systems; four won and two lost. Two used a different system; one won and one lost. Plaintiffs say that the nature and quality of reports produced by these small systems therefore cannot account for the different verdicts. Comprehensive replies that five of the six losers printed their reports on paper lacking Comprehensive's trademark, which the contract required them to use; the plaintiffs reply that no one used this paper, because Comprehensive would not sell it to them. Comprehensive tells us that the losing plaintiffs incurred debt to acquire their systems without giving Comprehensive advance notice, a notice required by contract to protect Comprehensive's ability to collect existing debts. (Comprehensive apparently lends substantial sums to its franchisees for a variety of purposes.) The plaintiffs reply that some of the winners incurred unauthorized debt and anyway that they were justified in not telegraphing their punches, given Comprehensive's hostility to small computers.

We cannot resolve this dispute short of becoming the triers of fact. All parties broke their word. The jury was required to find out which breaches came first and were most important. Some plaintiffs may have breached their obligations earlier and more substantially than others, and different cumulations of breaches may explain the divergent results. The outcome may be explicable or it may not. We need not decide.

As a rule civil juries must return consistent verdicts. *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 119 (1963); *Bates v. Jean*, 745 F.2d 1146, 1149-52 (7th Cir. 1984). Criminal juries need not be consistent, see *United States v. Powell*, 105 S. Ct. 471 (1984), but there is a special reason for this: the double jeopardy clause blocks any review of a verdict in favor of the defendant, and

a demand for consistency therefore levels everything down to an acquittal; yet because the jury may have meant to do no more than dispense clemency on one count, leveling down is inappropriate. *Id.* at 477. Cf. *Standefer v. United States*, 447 U.S. 10 (1980). The civil jury has no power to dispense clemency, and verdicts in the teeth of the evidence may be set right.

Inconsistency may reflect nothing but compromise, and compromise dilutes the requirement that verdicts be unanimous. True, compromise may arise from the fact that the evidence is inconclusive. The evidence may leave a jury on the line between the permissible outcomes, and a compromise may accurately reflect the uncertainties in human affairs. In a case with many plaintiffs, the compromise may work out just fine for the defendant (whose total judgment comes out right), but the cost is defeat for some plaintiffs. Each plaintiff is entitled to have his case decided separately, on a preponderance-of-the-evidence standard that itself recognizes the inevitable uncertainties in evidence. So although "[a]ppellate courts should be slow to impute to juries a disregard of their duties, and to trial courts want of diligence or perspicacity in appraising the jury's conduct," *Fairmont Glass Works Co. v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933), they may not abide inexplicable inconsistency when different parties are involved.[5]

---

[5] *Merchant v. Ruhle*, 740 F.2d 86 (1st Cir. 1984), holds that *general* civil verdicts may be inconsistent. See also Alexander M. Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 Harv. L. Rev. 649 (1950). *Merchant* assumes that the rule in criminal cases should apply in civil cases too; we think not, for reasons we have explained. It is also established that special verdicts of civil juries must be consistent. Inconsistent general verdicts may be much rarer, but there is no good reason to treat them differently from inconsistent special verdicts as a rule. There may be something to the First Circuit's argument when the inconsistency involves but one party, for this may arise in a borderline case. There is no special virtue to a rule of all-or-nothing when several different claims may cluster right around the boundary be-

(Footnote continued on following page)

This conclusion does not get plaintiffs where they want to go. A jury that returns inconsistent verdicts may be ordered to resume its deliberations. See *Bates*, *supra*; *Barnes v. Brown*, 430 F.2d 578 (7th Cir. 1970); *Cundiff v. Washburn*, 393 F.2d 505 (7th Cir. 1968). Fed. R. Civ. P. 49 explicitly authorizes this in case of special verdicts. A district court also may find inconsistent verdicts an adequate ground for a new trial. Either procedure removes the inconsistency. The plaintiffs did not ask the jury to continue its deliberations, however; they asked only for a poll of the jury.[6] Although they asked for a new trial, they restricted this request to the six losing plaintiffs; the six losers also seek judgment notwithstanding the verdict. The six prevailing plaintiffs have not offered to abide the outcome of another trial.

Plaintiffs may not simply assume, however, that the "right" verdicts are the ones in plaintiffs' favor. The problem here is inconsistency, not a judgment in the teeth of the evidence. The rule that each plaintiff is entitled to have his case determined independently is one source of our conclusion that juries may not compromise across plaintiffs to do right by defendants. It also means, however, that plaintiffs fare no better than if each case had been tried separately. In such a series of 12 trials, each plaintiff could have lost. The plaintiffs are not entitled to judgment notwithstanding the verdict or a new trial un-

---

[5] *continued*

tween judgment for plaintiff and judgment for defendant; a very small difference may put one claim over while the other fails. Different outcomes on very similar facts therefore may not be inconsistent at all. Whatever the appropriate treatment of one-party cases, inconsistency among parties is impermissible.

[6] *Barnes* and *Cundiff* hold that a request to have the jury resume its deliberations is the only appropriate response to special verdicts that are inconsistent with general verdicts, see Rule 49(b), and that if a party does not act in time he waives any later challenge. We need not decide whether this is also the rule for inconsistent general verdicts.

less no rational jury could have brought back a verdict for the defendants. *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943); *Freeman v. Franzen*, 698 F.2d 485 (7th Cir. 1982), *cert. denied*, 463 U.S. 1214 (1983); cf. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). The evidence here was conflicting; a verdict against all 12 plaintiffs would have been sustained, as a verdict for all 12 would have been. The six losing plaintiffs want another bite at the apple without exposing the six prevailing plaintiffs to jeopardy. The rule that verdicts should be consistent does not tilt the scales in favor of plaintiffs, and they are not entitled to a remedy that locks in their gains while they try for more.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 25, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ROBERT A. GRANT *Senior District Judge**

ROBERT J. WILL, et al.,
Plaintiffs-Appellants, Cross-Appellees,

No. 84-2761 and 84-2762 vs.

COMPREHENSIVE ACCOUNTING CORPORATION, et al.,
Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 4035—**Paul E. Plunkett**, *Judge.*

ORDER

Plaintiffs-Appellants, Cross-Appellees filed a petition for rehearing on November 12, 1985. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

APPENDIX B

The statutory provisions involved are:

Section 1 of the Sherman Act, 15 U.S.C. §1, providing in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .

Section 4 of the Clayton Act, 15 U.S.C. §15, providing:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1454

In the

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT J. WILL, et al.,

Petitioners,

vs.

COMPREHENSIVE ACCOUNTING CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THEODORE A. SHAPERO
30 North LaSalle Street
Suite 2800
Chicago, Illinois 60603
(312) 368-4021
Attorney for Respondents

RUDNICK & WOLFE
30 North LaSalle Street
Suite 2800
Chicago, Illinois 60602
(312) 368-4000
Of Counsel

The Scheffer Press, Inc.—(312) 263-6850

131 pp

QUESTIONS PRESENTED

1. Whether Comprehensive could be found to have committed a *per se* violation of the antitrust laws in a case involving an alleged tying arrangement absent proof that it had market power in the alleged tying product.

2. Whether one of the district court's jury instructions was in conflict with this Court's decision in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT	3
I.	3
II.	5
III.	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases Cited

PAGE

Carpa, Inc. v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976) 4,5

Capital Temporaries, Inc. v. *Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974) 5

Copperweld v. *Independence Tube Corp.*, 104 S.Ct. 2731 (1984) 4

Digidyne Corp. v. *Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984) 4,5

Jack Walters & Sons Corp. v. *Morton Building, Inc.*, 737 F.2d 698 (7th Cir. 1984) 6

Jefferson Parish Hospital District No. 2 v. *Hyde*, 466 U.S. 2 (1984) 3,4,5,6

Krehl v. *Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D.Cal. 1978) 6

Layne & Bowler Corp. v. *Western Wheel Works, Inc.*, 261 U.S. 387 (1923) 5,7

Perma Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 6

Siegel v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971) 5

United States Steel Corp. v. *Fortner Enterprises*, 429 U.S. 610 (1977) 3

Will v. *Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985) 1,3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1454

ROBERT J. WILL, et al.,

Petitioners,

vs.

COMPREHENSIVE ACCOUNTING CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit in this case in *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985).

STATEMENT OF THE CASE

This case arose out of a dispute between Comprehensive Accounting Corporation ("Comprehensive") and several of its franchisees over their ability to have their required

data processing done on minicomputers rather than on Comprehensive's mainframe. Petitioners claimed that they had complied with the requirements of their agreements with Comprehensive that permitted them to have their data processing done on minicomputers if certain standards were met, whereas Comprehensive claimed that they had failed to do so. Certain franchisees who were terminated and others who continued to use Comprehensive's mainframe commenced this action claiming that Comprehensive's refusal to permit them to have their data processing done on minicomputers constituted an illegal tying arrangement.

After a lengthy trial that involved antitrust as well as contract and other issues on which there were substantial factual disputes, the jury returned a verdict in favor of respondents on the antitrust claims. On petitioners' appeal, the Seventh Circuit concluded that, not only was the jury properly instructed, but, because petitioners failed to show that Comprehensive had market power in the alleged tying product—its franchise system, they failed to establish a *per se* antitrust violation as a matter of law.

SUMMARY OF ARGUMENT

The writ should be denied because, petitioners' argument notwithstanding, there is no real conflict between the Seventh Circuit's decision in this case and any decision of this Court or of another federal court of appeals. The issues raised by the petition involve application of settled principles, rather than conflicts of principles, and review of the Seventh Circuit's decision will impact primarily on only the parties to this case.

REASONS FOR DENYING THE WRIT

I.

Although petitioners initially state that the holding of the court below "directly conflicts" with this Court's decision in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984) (Pet. 5), later in their petition, they claim that it merely "subverts" it (Pet. 6). Regardless of which position they truly espouse, petitioners do not suggest *how* Judge Easterbrook's decision for the Seventh Circuit purports to conflict with this Court's decision in *Hyde*.

In fact, the Seventh Circuit's decision is entirely consonant with *Hyde*, wherein this Court held that a *per se* illegal tying arrangement can be established only when either the seller has market power in the tying product or the tying product is unique. The Seventh Circuit held that, although Compresensive's franchising system—the alleged tying product—may be unusual, it is not unique, and, therefore, petitioners must have presented proof of market power, which they did not do. *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d at 674. Although petitioners may disagree with this conclusion, it does not subvert, and is certainly not in conflict with, this Court's decision in *Hyde*, which did not consider the question of "uniqueness". That question was considered by this Court in *United States Steel Corp.* v. *Fortner Enterprises*, 429 U.S. 610 (1977) (*Fortner II*), however, and the conclusion of the court below that Comprehensive's franchise system is not unique is consistent with that decision.

Nor does the decision of the court below conflict with the decisions of the Courts of Appeal for the Fifth and Ninth Circuits in *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976), and *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 3534 (1985). Neither *Carpa* nor *Digidyne* holds, as petitioners claim, "that an illegal tie could be established based on the uniqueness of the tying product without showing market power over price" (Pet. 6). Indeed, after conceding the uniqueness of the tying product, the court of appeals in *Carpa* held directly to the contrary:

> We adhere to the principle applied by the Supreme Court in *Fortner, supra*:
>
> > [T]he proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market. 394 U.S. at 504, 89 S.Ct. at 1259.

536 F.2d at 48. Moreover, to the extent that it could be said that either decision stands for the proposition that petitioners suggest, it, not the decision of court below, is in conflict with prior decisions of this Court. *See Copperweld Corp.* v. *Independence Tube Corp.*, 104 S.Ct. 2731, 2752 n. 19 (1984) ("Market power is the ability to raise prices above those that would be charged in a competitive market".).

Both *Carpa* and *Digidyne* are also distinguishable from the decision of the court below. In *Carpa*, the court conceded the uniqueness of the tying product, and, in *Digidyne*, the tying product was unique because it enjoyed copyright protection. Judge Easterbrook concluded in this case, however, that Comprehensive's franchise system—the alleged tying product—is not unique, and, thus, in or-

der to have prevailed, petitioners must have shown that Comprehensive had market power over price. This does not conflict with either *Carpa* or *Digidyne* and is entirely consistent with *Hyde*.

II.

Petitioners further argue that the holding of the court below conflicts with the decision of the Ninth Circuit Court of Appeals in *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). The court there held "that the District Court did not err in ruling as a matter of law that the tying product—the license to use the Chicken Delight trade-mark—possessed sufficient market power to bring the case within the Sherman Act." 448 F.2d at 50. This is a far cry from saying, as petitioners do, that a defendant need not possess market power to be guilty of an illegal tie-in. The Seventh Circuit's conclusion in this case that Comprehensive did not have market power as a matter of law does not conflict with the Ninth Circuit's conclusion in *Siegel* that Chicken Delight did. The decisions of these two courts of appeals are reconcilable on their facts. There is no "real and embarrassing conflict" between them. *Layne & Bowler Corp.* v. *Western Wheel Works, Inc.*, 261 U.S. 387, 393 (1923).

Even if these decisions were construed to be in conflict, Judge Easterbrook's decision for the Seventh Circuit in this case is in accordance with the majority view that the existence of a trademark in and of itself does not supply economic power sufficient to constitute an antitrust violation. *See Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d at 48; *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658, 663 (2d Cir. 1974). *Siegel*, on the other hand, has been questioned even within the Ninth Circuit itself, *See Krehl*

v. *Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D.Cal. 1978), and is of questionable continuing vitality in light of this Court's decision in *Hyde* and in light of the proliferation of franchise systems in the fast-food business, as well as other businesses of all kinds. *Jack Walters & Sons Corp.* v. *Morton Building, Inc.*, 737 F.2d 698, 705 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 785 (1985).

III.

Lastly, petitioners suggest that the holding of the court below directly conflicts with this Court's decision in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). Petitioners contend that one of the numerous jury instructions that the district court gave in this factually complex case was inconsistent with this Court's holding in *Perma Life*. This Court did not purport to fashion jury instructions in *Perma Life*; it only established the law on which the jury was to be instructed. Even if the instruction that was given may not have been a model of clarity, both the district court and the court of appeals held that it was proper, and it certainly cannot be said to conflict with this Court's decision in *Perma Life*, when the jury was instructed that a conscious commitment to a common scheme meant "that the franchisee unwillingly agreed to use Comprehensive for its data processing, an agreement induced by a fear of termination." (Pet. 9).

Even assuming *arguendo* that the instruction complained of was somehow objectionable, because petitioners did not establish market power as they must have done, granting certiorari to review this question will neither change the outcome of this case nor affect the outcome of future decisions. In any event, this question (and any other raised by petitioners) does not warrant this Court's review be-

cause it does not involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Wheel Works, Inc.*, 261 U.S. at 393.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not be granted.

Respectfully submitted,

THEODORE A. SHAPERO
30 North LaSalle Street
Suite 2800
Chicago, Illinois 60603
(312) 368-4021
Attorney for Respondents

RUDNICK & WOLFE
30 North LaSalle Street
Suite 2800
Chicago, Illinois 60602
(312) 368-4000
Of Counsel